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47403—34——1

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. ——

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

MORGAN'S, INCORPORATED, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the First Circuit entered in the above-entitled case on December 15, 1933.

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 14–16) is unreported. The opinion of the Circuit Court of Appeals for the First Circuit (R. 34–39) is reported in 68 F. (2d) 325.

JURISDICTION

The judgment below was entered December 15, 1933 (R. 40). On February 24, 1934, Mr. Justice Brandeis entered an order extending the time for the filing of a petition for a writ of certiorari for sixty days from March 15, 1934 (R. 40). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Where two pre-existing corporations become affiliated during a normal taxable year of twelve months and thereafter file a consolidated return for the period of affiliation, does such action divide the twelve-months' period into two taxable years for the purpose of applying the net loss provisions of Section 206 of the Revenue Act of 1926?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in Appendix A, *infra,* pp. 10–13.

STATEMENT

The facts found by the Board of Tax Appeals (R. 14–15, 16–17) may be summarized as follows:

Morgan's, Incorporated, and Haines Furniture Company are Massachusetts corporations, organized prior to 1925. On June 1, 1925, Morgan's, Incorporated, acquired all of the outstanding voting stock of Haines Furniture Company and thereafter the two companies filed a consolidated return

for the full calendar year 1925, reporting the net income of Morgan's, Incorporated, and the net loss of the Haines Furniture Company for the full calendar year (R. 14).

During the years 1925, 1926, and 1927 Morgan's, Incorporated, had net incomes of $203,527.24, $142,900.94, and $182,932.12, respectively. For the periods January 1, 1925, to May 31, 1925, June 1, 1925, to December 31, 1925, and the year 1926, the Haines Furniture Company had net losses of $59,239.56, $61,626.69, and $2,551.76. During the year 1927 it had a net income of $63,188.34. (R. 14.) On March 14, 1928, the Haines Furniture Company filed a separate return for the period January 1 to May 31, 1925, showing its net loss of $59,239.56. Its net loss of $61,626.69 for the balance of the year 1925 was included in the consolidated return and used as a deduction from Morgan's, Incorporated, net income for that period. Similarly, the net loss of Haines Furniture Company for 1926 was included in the consolidated return filed for 1926 and used to reduce Morgan's, Incorporated, net income for that year. In the consolidated return for 1927, the Haines Furniture Company sought to bring forward its net loss of $59,239.56 sustained during the period January 1 to May 31, 1925, and deduct this sum from its $63,188.34 net income for 1927. (R. 15.)

The Commissioner disallowed the deduction (R. 9) and determined a deficiency accordingly (R. 7). Appeal was taken to the Board of Tax

Appeals (R. 5–12), where the Board held that by becoming affiliated on June 1, 1925, and filing a consolidated return for the remainder of the year, the calendar year was divided into two taxable years, within the meaning of Sections 200 and 206 of the Revenue Act of 1926, and therefore the year 1926 constituted the second and last taxable year to which the loss for the first part of 1925 could be carried (R. 14–16). On petition for review, the Circuit Court of Appeals for the First Circuit held that the calendar year 1925 was not divided into two taxable years, and accordingly reversed the decision of the Board of Tax Appeals (R. 34–39).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the First Circuit erred—

(1) In holding that the definition of the term "taxable year" as found in Section 200 of the Revenue Act of 1926 applies to the term "taxable year" as used in the first part of the first sentence of Section 206 (b), but not to the same term as twice used in the latter part of the same sentence.

(2) In holding that the calendar year 1925 was not divided into, and did not consist of two "taxable years", for the purpose of applying the net loss provisions of Section 206 to the computation of the net income of the Haines Furniture Company for the year 1927.

(3) In reversing the decision of the Board of Tax Appeals.

REASONS FOR GRANTING THE WRIT

1. The decision below is in direct conflict with the decision of the Court of Appeals of the District of Columbia in *Wishnick-Tumpeer, Inc.*, v. *Commissioner*, decided March 12, 1934.[1] The opinion in this case is not yet reported, but a copy is printed as Appendix B to this petition (*infra*, pp. 14–23). Although the *Wishnick-Tumpeer* case arose under the Revenue Act of 1928, and involved the provisions of Regulations 75, there is, we submit, no basis of distinction between the two cases on this ground. In each case the ultimate question is the meaning of the word "taxable year" as used in the applicable section of the statute.

There are other cases pending in other Circuit Courts of Appeals. The question is one of general importance which frequently arises, and which should be finally determined by this Court.

2. The decision below is erroneous, representing an unwarranted extension of the express provisions of the statute.

The right of the Haines Furniture Company to deduct in 1927 a loss sustained by it in 1925 must

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[1] On the same date the Circuit Court of Appeals for the Second Circuit handed down its opinion in *Arnold Constable Corp.* v. *Commissioner*, following the opinion of the court below in the present case. A motion for a rehearing to stay the finality of the judgment in the *Arnold Constable* case pending the disposition of the present case is being filed.

be found in a specific provision of the statute or it does not exist. *Woolford Realty Co.* v. *Rose,* 286 U.S. 319, 326; *Dalton* v. *Bowers,* 287 U.S. 404, 409. The only statute to which respondents may point is Section 206 (b) of the Revenue Act of 1926. That section provides:

> If, for any *taxable year,* it appears upon the production of evidence satisfactory to the Commissioner that any taxpayer has sustained a net loss, the amount thereof shall be allowed as a deduction in computing the net income of the taxpayer for the succeeding *taxable year* (hereinafter in this section called "second year"), and if such net loss is in excess of such net income (computed without such deduction), the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding *taxable year* (hereinafter in this section called "third year"); * * *. (Italics ours.)

The term "taxable year" is specifically defined by Section 200 of the Revenue Act of 1926 as follows:

> The term "taxable year" includes, *in the case of a return made for a fractional part of a year* under the provisions of this title or *under regulations prescribed by the Commissioner with the approval of the Secretary, the period for which such return is made.* * * * (Italics ours.)

Article 634 of Regulations 69, promulgated under this section, provides that—

> (b) where corporations are not affiliated at the beginning of the taxable year but through change of stock ownership during the year become affiliated, a full disclosure of the circumstances of such changes of stock ownership shall be submitted to the Commissioner.
>
> Ordinarily in such cases, where only two corporations are involved * * * under the conditions described in (b) above, *each corporation should file a separate return from the beginning of the taxable period to the date of the change in stock ownership, and a consolidated return should be filed by the parent or principal corporation from the date of change of stock ownership to the end of the taxable year,* including therein the income of the subsidiary or subordinate corporation for such period. (Italics ours.)

Here the two corporations were not affiliated at the beginning of the year, but through a change of stock ownership became affiliated on June 1, 1925. They filed a consolidated return for the entire year but later the Haines Furniture Company, in compliance with the regulations, filed a separate return for the period January 1 to May 31, 1925.[2] Thus the Haines Furniture Company was required to,

[2] The Board of Tax Appeals has uniformly held that the filing of such a separate return was required. *American LaDentelle, Inc.*, v. *Commissioner*, 1 B.T.A. 575; *Green*

and it did, file a separate return for the period January 1 to May 31, 1925, and the two companies filed a consolidated return for the period June 1 to December 31, 1925. Accordingly, the calendar year 1925 was divided into two " taxable years " under the plain provisions of Section 200, *supra*.[3] The Board therefore held that the calendar year 1926 became the "third taxable year", within the meaning of Section 206, for the purpose of applying the 1925 net loss and consequently that the 1925 net loss could not be carried forward to the taxable year 1927.

The Circuit Court of Appeals, however, held that the term "taxable year", as used in the first part of the first sentence of Section 206 (b), means any period of less than twelve months for which a return is required to be made by the regulations; but that the same phrase as used twice again in the same sentence means a full period of twelve months only. We submit that there is no justification for

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River Distilling Co. v. *Commissioner*, 16 B.T.A. 395; *Weissberger Moving & Storage Co.* v. *Commissioner*, 26 B.T.A. 1375; *Joseph & Feiss Co.* v. *Commissioner*, 26 B.T.A. 1424, now pending on appeal in the Circuit Court of Appeals for the Sixth Circuit, No. 6386; *Arnold, Constable Corp.* v. *Commissioner*, 26 B.T.A. 1427, reversed by the Circuit Court of Appeals for the Second Circuit on March 12, 1934. See also *American Paper Exports* v. *Bowers*, 54 F. (2d) 508, 509 (C.C.A. 2d).

[3] This conclusion is also fortified by the provisions of Section 226 (b) (made applicable to corporations by Section 239) and by Article 1523 of Regulations 69.

such a distorted meaning of the plain provisions of the statute.

Wherefore it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the First Circuit should be granted.

J. CRAWFORD BIGGS,
Solicitor General.

MARCH 1934.

APPENDIX A

Statutes and Regulations Involved

Revenue Act of 1926,[4] c. 27, 44 Stat. 9

Sec. 200. When used in this title—

(a) The term "taxable year" means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under section 212 or 232. The term "fiscal year" means an accounting period of 12 months ending on the last day of any month other than December. The term "taxable year" includes, in the case of a return made for a fractional part of a year under the provisions of this title or under regulations prescribed by the Commissioner with the approval of the Secretary, the period for which such return is made. The first taxable year, to be called the taxable year 1925, shall be the calendar year 1925 or any fiscal year ending during the calandar year 1925. (U.S.C.App., Title 26, Sec. 931.)

Sec. 206. (b) If, for any taxable year, it appears upon the production of evidence satisfactory to the Commissioner that any taxpayer has sustained a net loss, the amount thereof shall be allowed as a deduction in computing the net income of the taxpayer for the succeeding taxable year (herein-

[4] Effective as of Jan. 1, 1925; see Section 286 of the Revenue Act of 1926.

after in this section called "second year"), and if such net loss is in excess of such net income (computed without such deduction), the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year (hereinafter in this section called "third year"); the deduction in all cases to be made under regulations prescribed by the Commissioner with the approval of the Secretary. (U.S.C.App., Title 26, Sec. 937.)

SEC. 226. (b) Where a separate return is so made, and in all other cases where a separate return is required or permitted, by regulations prescribed by the Commissioner with the approval of the Secretary, to be made for a fractional part of a year, then the income shall be computed on the basis of the period for which separate return is made. (U.S.C.App., Title 26, Sec. 968.)

SEC. 240. (a) Corporations which are affiliated within the meaning of this section may, for any taxable year, make separate returns or, under regulations prescribed by the Commissioner with the approval of the Secretary, make a consolidated return of net income for the purpose of this title, in which case the taxes thereunder shall be computed and determined upon the basis of such return. If return is made on either of such bases, all returns thereafter made shall be upon the same basis unless permission to change the basis is granted by the Commissioner.

(b) In any case in which a tax is assessed upon the basis of a consolidated return, the total tax shall be computed in the first instance as a unit and shall then be assessed upon the respective affiliated cor-

porations in such proportions as may be agreed upon among them, or, in the absence of any such agreement, then on the basis of the net income properly assignable to each. There shall be allowed in computing the income tax only one specific credit computed as provided in subdivision (b) of section 236. (U.S.C.App., Title 26, Sec. 933.)

TREASURY REGULATIONS 69, PROMULGATED UNDER THE REVENUE ACT OF 1926

ART. 634. *Change in ownership during taxable year.*—(a) Where corporations are affiliated at the beginning of a taxable year but due to a change in stock ownership during the year the affiliated status is terminated, or (b) where corporations are not affiliated at the beginning of the taxable year but through change of stock ownership during the year become affiliated, a full disclosure of the circumstances of such changes of stock ownership shall be submitted to the Commissioner.

Ordinarily in such cases, where only two corporations are involved, the parent or principal corporation, under the conditions described in (a) above, should file a consolidated return including the income of such subsidiary or subordinate corporation to the date of the change of stock ownership, and each should file a separate return from the date of such change in stock ownership to the end of the taxable period, and, under the conditions described in (b) above, each corporation should file a separate return from the beginning of the taxable period to the date of the change in stock ownership, and a consolidated return should be filed by the parent or principal corporation from the date of

change of stock ownership to the end of the taxable year, including therein the income of the subsidiary or subordinate corporation for such period.

* * * * *

Where, in accordance with the procedure set forth above, a return is made by a corporation for a period less than a year, the tax shall be computed in accordance with sections 226 and 239 and the articles thereunder. Where corporations become affiliated during the taxable year the separate returns of the corporations for the portion of the taxable year during which they were not affiliated will not be due until the fifteenth day of the third month following the close of the taxable year. * * *

ART. 1523. *"Taxable year", "withholding agent", "paid or incurred", and "paid or accrued."*—The taxable year is the time unit for the purpose of the tax. The term includes, in the case of a return made for a fractional part of a year under these regulations, the period for which the return is made. (See section 212 and article 22.) * * *.

APPENDIX B

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 6015

Wishnick-Tumpeer, Inc., petitioner

v.

Guy T. Helvering, Commissioner of Internal Revenue, respondent

On Petition for Review of Decision of the United States Board of Tax Appeals

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(*Argued February 7, 1934. Decided March 12, 1934*)

Before Martin, Chief Justice, and Robb, Van Orsdel, Hitz, and Groner, Associate Justices.

GRONER, *Associate Justice:* Petitioner, whom we shall call Tumpeer, was an Illinois corporation, and, prior to November 1, 1928, and thereafter, owned in excess of 95 percent of the stock of Pioneer Asphalt Company, also an Illinois corporation, whom we shall call Pioneer. Both Tumpeer and Pioneer filed separate returns for the taxable year 1928 on the basis of their regular accounting periods, which were, as to Tumpeer, the calendar year, and, as to Pioneer, the fiscal year ending October 31. Tumpeer on May 28, 1929, asked for and was granted permission by the Commissioner

to change its taxable year from the calendar year to a fiscal year ending June 30, with a provision in such permit that in order to effect the change Tumpeer would be required to file a return on or before September 15, 1929, covering the period January 1, 1929, to June 30, 1929. Tumpeer, with the consent of Pioneer, duly filed a consolidated return for the period ending June 30, 1929. This return included its net income for the period January 1 to June 30, 1929, the net income of another affiliate whom we need not notice, and the net income of Pioneer for the eight months' period November 1, 1928, to June 30, 1929. In computing the income of Pioneer, there was deducted a net loss admittedly sustained by that company for the fiscal year ending 1927, no portion of which had been used to offset its income for the taxable year ended October 31, 1928. Tumpeer deducted this net loss from the income of Pioneer for the period November 1, 1928, to June 30, 1929. The Commissioner held that this was not permissible and apportioned the income for the eight months' period between the two months November and December 1928, and the six months, January to July 1929, and allowed the 1927 net loss against the income allocated to November and December, but denied the right to offset the remainder against the income for the period January to July 1929. The effect of this was to reduce the allowable deduction in computing the consolidated taxable net income for the year ended June 30, 1929. The Commissioner accomplished this result by treating the period November and December 1928 as a separate taxable year.

The single question, therefore, we have to determine is whether his action in this respect was correct. The answer to this involves an examination of the provisions of the income-tax laws as to accounting periods, particularly with reference to those allowing net losses to be spread over a three-year period, and, more particularly, with reference to the Revenue Act of 1928 so far as it relates to the right of affiliated corporations to file a consolidated return. The act in specific terms (section 141 (a); 45 Stat. 831; 26 U.S.C.A. sec. 2141 (a)) extends the privilege upon the condition that all the corporations for which the return is made "consent to all the regulations under subsection (b) prescribed prior to the making of such return." Subsection (b) (45 Stat. 831; 26 U.S.C.A. sec. 2141 (b)) reads as follows:

> The Commissioner, with the approval of the Secretary, shall prescribe such regulations as he may deem necessary in order that the tax liability of an affiliated group of corporations making a consolidated return and of each corporation in the group, both during and after the period of affiliation, may be determined, computed, assessed, collected, and adjusted in such manner as clearly to reflect the income and prevent avoidance of tax liability.

The Commissioner, acting under the authority of the statute, promulgated certain rules in relation to the subject, known as Regulations 75. One of such rules (art. 14) entitled "Accounting Period of an Affiliated Group", reads as follows:

> The taxable year of the parent corporation shall be considered as the taxable year of an affiliated group which makes a con-

> solidated return, and the consolidated net income must be computed on the basis of the taxable year of the parent corporation.

Another (art. 13 (g)) reads:

> If a corporation, during its taxable year, becomes a member of an affiliated group, its income for the portion of such taxable year not included in the consolidated return of such group must be included in a separate return.

And still another (art. 41 (d)) reads:

> Any period of less than 12 months for which either a separate return or a consolidated return is filed * * *, shall be considered as a taxable year.

We have, therefore, here a case in which corporations, though affiliated, had consistently filed separate returns. In the case of the parent corporation, the basis of its accounting period was the calendar year, and in the case of its affiliate the fiscal year ending October 31. After the passage of the 1928 law, Tumpeer (the parent company) asked for and received permission to change its accounting period for 1929 from the calendar year to the fiscal year ending June 30. It had filed a separate return for the calendar year January 1 to December 31, 1928. Its return period, therefore, for the taxable year 1929 was January 1 to June 30, and this period, giving effect to the regulation of the Commissioner quoted above, likewise determined the taxable year of its affiliates. It was therefore ruled by the Commissioner that the act and the regulations required that Pioneer must file, or be treated as having filed, a separate return for the period between the end of its former sep-

arate return period and the commencement of the taxable year of its parent, i.e., November and December 1928.

The position of Tumpeer is that the term "taxable year" as used in section 117 of the Revenue Act of 1928 does not mean a fraction of a year, as the Commissioner contends, but does mean a full twelve months' period, and that since a corporation retains its separate entity as a taxpayer irrespective of affiliation, the latter state cannot, under any regulation of the Commissioner, deprive it of the right to deduct for two succeeding years its own net loss from its own net gain.

Section 117 (b) (45 Stat. 825; 26 U.S.C.A. sec. 2117 (b)) provides:

> If, for any taxable year, it appears upon the production of evidence satisfactory to the Commissioner that any taxpayer has sustained a net loss, the amount thereof shall be allowed as a deduction in computing the net income of the taxpayer for the succeeding taxable year (hereinafter in this section called "second year"), and if such net loss is in excess of such net income (computed without such deduction), the amount of such excess shall be allowed as a deduction in computing the net income for the next succeeding taxable year (hereinafter in this section called "third year"); the deduction in all cases to be made under regulations prescribed by the Commissioner with the approval of the Secretary.

This position of Tumpeer is the crux of the case.

The net loss-extension provision was first inserted in the Revenue Act of 1918, and has continued practically unchanged, except that in 1921

the right to make the deduction was extended from the next succeeding year to the next two succeeding years, and it was not until the Revenue Act of 1924 that the term "taxable year" was defined, but in that act and in succeeding acts, including the act of 1928, "taxable year" was defined to include, in the case of a return made for a fractional part of a year, the period for which such return was made. (Sec. 48 (a); 45 Stat. 807; 26 U.S.C.A. sec. 2048 (a)).

Tumpeer insists, however, that the legislative history and the reports of the committees of Congress indicate that the congressional intent in thus defining the term was to broaden rather than to narrow the rights of taxpayers; that the provision was inserted as a measure of relief for taxpayers required by uncontrollable circumstances to make a return for a period of less than a full year; and that it was never intended to limit the period of the loss carryover under two years of twelve months each. In short, it is argued that Congress, first of all, extended the loss deduction period two years, and then, to make it apply in the case of a taxpayer commencing operation within the year, or discontinuing or dissolving, defined the term "taxable year" as the period for which a return was made—though less than twelve months—to include within its provisions taxpayers thus circumstanced. And so it is insisted here it never was intended to limit the carryover period, or deny its benefits to a taxpayer voluntarily but as the result of affiliation changing its accounting period. So it is said that since each taxpayer remains such in his own right, the accounting practice of each corporation at the

commencement of affiliation should be followed, though it involves separate returns for different periods of the year, and that each such corporation in such circumstances is entitled to its own deductions for its accounting period, because otherwise the mere fact of affiliation would deprive it of the rights granted by the net-loss provisions of the statute.

The argument is plausible, and the question is not without difficulty, for it is undeniable that Pioneer, had it continued to file a separate return, would have been entitled to deduct the losses of 1927 in its return for its fiscal year November 1, 1928, to November 1, 1929, and it is equally undeniable that, if the Commissioner's position is correct, the making of a consolidated return has lost it this right, for the Commissioner's ruling is to take away from it something which in its state before affiliation the law gave it, and this brings us back to the questions, first, whether the interpretation of the regulations by the Commissioner is correct, and, second, if correct, whether the regulations themselves are valid.

To answer these questions we look to the statute. First, was the Commissioner correct in requiring a separate return from Pioneer for the two months' period ending December 31, 1928? The answer to this is that the Commissioner's regulation (article 14, regulations 75) specifically so provides, for it says that the taxable year of the parent corporation shall be also the taxable year of the affiliates, and since, as appears already, the first taxable year of Tumpeer under the consolidated status began January 1, 1929, it is perfectly clear that the regulation

required its affiliates to make their returns on the same basis of time. In the case of Pioneer this left an unaccounted-for period. Obviously some sort of return was necessary to cover this period, and that it should be a separate return seems to us to be specifically required in (g) of article 13 of regulations 75, which provides: "If a corporation, during its taxable year, becomes a member of an affiliated group its income for the portion of such taxable year not included in the consolidated return of such group must be included in a separate return." Little more need be said as to this. Here Pioneer's taxable year was the fiscal year November 1 to October 31. In September 1929 it consented in writing to the filing by Tumpeer of a consolidated return, and likewise it agreed to be bound by the Commissioner's rules. This of course was an assent to a change of its taxable year period to conform to that of Tumpeer, its parent. It was, therefore, an agreement "during its taxable year" to become a member of an affiliated group for the purpose of filing consolidated returns, and, by the express terms of the provision of the regulations, it became its duty to cover the intermediate period, that is to say, the period from its last return to the commencement of the new consolidated tax year, by filing a separate return, and since Congress specifically extended the privilege of filing a consolidated return on condition that the corporations availing of it should thereby consent to all the regulations the Commissioner may prescribe, it is plain to us the taxpayer may not now question the rules of the Commissioner. As was said by the Supreme Court in *Woolford Realty Company* v. *Rose,* 286

U.S. 319, 330–31; "The Revenue Act of 1928 (section 141b) protects against unfair evasions in the making of consolidated returns by increasing the discretionary power of the Commissioner in prescribing regulations." The authority of course must be used fairly and so as not to do any violence to the provisions of the statute, but having regard to the possibilities which the contention of the taxpayer here would lead to in the way of extending the return beyond even the two-year period, we are convinced that, in requiring a separate return and in treating the period embraced within it as one of the two years permitted for the loss carry-over, nothing in the regulations can be said to be violative of the intent of Congress under the provisions of section 117 (b) supra. By both statute and regulations (act 1928, sec. 48 (a), supra; reg. 75, art. 41 (d)) the taxable year is defined to be the period for which a return is filed, though only a fractional part of the year. The language is plain, and there is no need for resort to any other source to discover its meaning. The argument of Tumpeer would require us to reject the ordinary rule of interpretation and to say that the words used should be given no effect because to do so would defeat the obvious purpose of Congress to permit net losses to be spread over a full three-year period. This we do not feel we may properly do.

Tumpeer as a second point suggests that, since admittedly Pioneer might have taken the entire loss without question by filing a separate return, the rejection by the Commissioner of the return filed is in effect a decision that it had not assented to the filing of a consolidated return; in other words,

that the only return it consented to file was the one it actually filed, which was a single return for the entire period November 1, 1928, to June 30, 1929, whereas the ruling of the Commissioner that it should have filed two returns, one covering the two months and the other the six months' period, is the equivalent of saying that it had not complied with the regulations and had not filed a consolidated return. It is argued from this that the return filed should be treated as a separate return, in other words, that having filed what it believed to be a consolidated return under a misapprehension of its rights, it had a right when apprized of this fact to have its return treated as a separate return; but we think there is nothing in this point. We find in the decision of the Board that Pioneer duly authorized and consented to the filing of a consolidated return on its behalf. This was a binding election, and is not recallable because Pioneer misunderstood the requirements to effectuate the purpose.

The finding and conclusion of the Board are affirmed.

Affirmed.

U. S. GOVERNMENT PRINTING OFFICE: 1934